Supreme Court, U.S.
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# 85-1024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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No. _____

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ELLEN V. PLISKA, Petitioner,

v.

STEEL KING INDUSTRIES, INC., Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

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## QUESTION PRESENTED

IF THE EMPLOYEE HAS SHOWN A PRIMA FACIE CASE UNDER THE EQUAL PAY ACT, 29 U.S.C. SECTION 206(d)(1), DOES THE EMPLOYEE OR THE EMPLOYOR HAVE THE BURDEN OF PERSUASION REGARDING EQUALITY OF WORK?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

---

No. _____

---

ELLEN V. PLISKA, Petitioner,

v.

STEEL KING INDUSTRIES, INC., Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

The petitioner Ellen V. Pliska respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 19, 1985.

## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

No opinion was rendered by the District Court for the Western District of Wisconsin.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 19, 1985. This Court's jurisdiction is invoked under 28 U.S.C. s. 1254(1).

## STATUTORY PROVISION INVOLVED

United States Code, Title 29:

Section 206(d)(1), The Equal Pay Act

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply

with the provision of this subsection, reduce the wage rate of any employee.

## STATEMENT OF THE CASE

### 1. Summary of the Status of the Case.

This matter was originally filed by the petitioner as a complaint for damages due to employment discrimination on the basis of sex. The complaint was filed in the United States District Court for the Western District of Wisconsin on October 20, 1983. Record at 2. Alternative causes of action pursuant to the Equal Pay Act, 29 U.S.C. Section 206(d)(1) and Title VII 42 U.S.C. Section 2000e were alleged in the amended complaint. Record at 5. The matter was tried solely on the Equal Pay Act claim. See Joint Pretrial Statement, Record at 50.

The Equal Pay Act claim was tried before a jury on September 24 and 25, 1984, and a verdict was reached for respondent. Record at 72. Judgment dismissing the case in favor of respondent was entered on September 28, 1984. Record at 73.

A notice of appeal from the judgment in favor of respondent was filed by the petitioner on October 3, 1984, with the United States Court of Appeals for the Seventh Circuit. Record at 74. The United States Court of Appeals for the Seventh Circuit entered judgment affirming the judgment of the trial court on August 19, 1985, with an opinion issued the same date. Appendix 1 and 2.

2. Procedures at the Trial and Facts of the Case.

Before trial on September 14, 1984, the respondent filed an amended answer setting forth for the first time three affirmative defenses. The affirmative defenses claimed: (1) that the wages of the petitioner were less since payments were made pursuant to a system which measured earnings based on quantity or quality of production or were based upon a differential or a factor other than sex; (2) that if discrimination was found that the acts

of the respondent were in good faith; and (3) that if discrimination was found the discrepancy in wages was due to drastic personnel changes, job descriptions and change in job responsibilities and positions, caused by the filing of a petition for bankruptcy by the respondent. Record at 53. The respondent's motion for leave to amend the answer was granted by the Magistrate on September 14, 1984. Record at 52.

The matter was tried before a six-person jury in the United States District Court for the Western District of Wisconsin at Madison, Wisconsin, on September 24 and 25, 1984. Record at 76 and 78.

The respondent, Steel King Industries Incorporated, hereinafter referred to as Steel King, is a Wisconsin corporation doing business in Stevens Point, Wisconsin. Steel King is a company which manufactures and sells material handling devices such as storage racks and containers, as well as other items

such as screwjacks which are used in the agricultural field for balers. Record at 76, pages 30 and 31.

The petitioner was originally hired by Steel King in August of 1978 as a "draftsman." Record at 78, page 31. In February of 1979, the petitioner's position at Steel King was changed to that of traffic clerk. Record at 78, page 32. After three or four months the petitioner was promoted to assistant traffic manager. Id., page 34. Plaintiff was trained to perform the functions of traffic manager, performed them as assistant traffic manager, and assumed the position of traffic manager when Terry Wenzel, the previous traffic manager resigned in March of 1980. Id., pages 34-36. The petitioner continued in the position of traffic manager until she resigned on September 3, 1982. Id., page 59, Record at 11, page 5.

The petitioner's claim for damages due to violation of the Equal Pay Act is based on the

difference in salary between the rate paid Terry Wenzel as traffic manager and the rate paid to the petitioner as traffic manager. The salary differential between the petitioner and Terry Wenzel which is the basis for the claim under the Equal Pay Act totals $13,544.65. Record at 76, pages 92 and 93.

Bradley Worzella, the supervisor of both the petitioner and Mr. Wenzel, testified that the functions of the traffic manager position remained the same after the petitioner assumed the position. Record at 76, page 8. Mr. Worzalla also testified that the petitioner and Mr. Wenzel had equal responsibility in their positions, Record at 76, page 10; that they performed under similar working conditions and with equal skill, Record at 76, page 11; and that there was no other person who supervised said employees other than himself, Record at 76, pages 6 and 13.

No reason for disparity in salary was ever communicated to the petitioner during her employment. Record 78, pages 61 and 62.

The respondent's argument at trial was that Terry Wenzel, the previous traffic manager, did not have the same job as the petitioner. The respondent contended that Mr. Wenzel's job required more skill, training, background and experience, and that he operated in other departments in the company. Respondent's closing argument, Record at 76, pages 104-109.

The jury trial dealt only with the question of liability under the Equal Pay Act. By agreement of the parties, the question of damages was to be determined by the court if the petitioner received a favorable verdict on liability. Record at 78, page 2.

At the final pretrial conference which was held before the Magistrate on September 13, 1984, the petitioner contended that the jury should be instructed that the burden of

persuasion was that of the respondent, if the petitioner proved a prima facie case. The petitioner presented a written proposed jury instruction and brief in support of this instruction by filing the same on September 10, 1984, and arguing for said instruction on September 13, 1984, at the pretrial conference. Plaintiff's revised proposed jury instruction--burden of proof, Record at 48.

The Magistrate denied the proposed jury instruction, placing the burden of persuasion on petitioner. Order on final pretrial conference, Record at 54, page 2.

At the close of the petitioner's case, the court found that the petitioner had met the burden of putting on a prima facie case. Judge Crabb's findings noted in Record at 76, pages 22 and 23.

At the close of the petitioner's case, the petitioner's attorney again requested that the jury be instructed that the burden of

persuasion was on the respondent. Record at 76, pages 25-28.

After the presentation of all the evidence, during the instruction conference, Judge Crabb indicated she would not be accepting the petitioner's proposal to make the respondent carry the burden of proof. Record at 76, page 81. The petitioner objected to the judge's proposed instruction placing the burden of proof on the petitioner. Record at 76, page 82 and 130.

Judge Crabb instructed the jury that the burden of persuasion was on the petitioner. Record at 76, pages 123-124.

The jury returned a verdict for the respondent on the question of liability under the Equal Pay Act. Record at 72. Judgment was entered in favor of respondent on September 28, 1984. Record at 73.

3. The Appeal to the United States Court of Appeals for the Seventh Circuit.

The petitioner appealed to the United States Court of Appeals for the Seventh Circuit as indicated above and presented the same question to the Seventh Circuit as is presented in this petition.

In its opinion dated August 19, 1985, the Seventh Circuit framed the issue as whether the District Court erred in instructing the jury that Pliska had to establish by a preponderance of the evidence that the work she performed was equal to that of her male counterpart. In its decision, the Seventh Circuit interpreted the plaintiff's burden of a prima facie case in Equal Pay Act cases as the burden to establish by a preponderance of the evidence that the petitioner performed job duties substantially equal in terms of skill and effort as those performed by another employee of a different sex.

## REASON FOR GRANTING THE WRIT

THE OPINION OF THE SEVENTH CIRCUIT IN THIS MATTER IS IN CONFLICT WITH DECISIONS OF CIRCUIT COURTS OF APPEALS.

All other decisions of the Circuit Courts of Appeals referring to this issue speak of prima facie case in the traditional sense and do not define it in terms of a burden of persuasion by a preponderance of the evidence. This Court cited some of said decisions under the Equal Pay Act in Corning Glass Works v. Brennan, 417 U.S. 188, 197 n.11 (1974). In that case the Court affirmed the rule that under the Equal Pay Act exemptions to the Act must be proved by the employer once the employee has carried her initial burden.

Before the Seventh Circuit's decision in this matter, no Circuit Court of Appeals had deviated from the traditional definition of prima facie case. Until this decision by the Seventh Circuit, the question of whether a prima facie case has been met always was: "Is

there enough evidence produced to enable a reasonable fact finder to infer that the plaintiff has made her case?" For an excellent discussion of the meaning of prima facie case, see Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982).

It is extremely important that this Court grant this petition so as not to jeopardize the Equal Pay Act as it has been interpreted by this Court and other courts previous to this decision.

It has been well established by the courts that the defendant-employer carries the burden of persuasion in a case under the Equal Pay Act once the petitioner has proved a prima facie case. The cases have repeatedly held that once the plaintiff shows that she has been paid wages less than the rate at which the employer has paid employees of the opposite sex for jobs which require equal skill, effort and responsibility and which are performed under similar working conditions,

then the defendant has the burden of persuasion to show that the plaintiff was paid at a different rate for a reason other than sex. The plaintiff's burden is that of showing a prima facie case.

The most important reason for this rule is that the facts necessary to establish that a wage differential has a basis in a factor other than sex are peculiarly within the knowledge of the employer, and an employer should not be able to evade the EPA on the basis of subjective uncommunicated reasons.

The Federal Equal Pay Act, 29 U.S.C. Section 206(d)(1) was signed into law on June 10, 1963. It was enacted as an amendment to Section 6 of the Fair Labor Standards Act. The law became effective on June 11, 1964. 6A BNA Labor Relations Reporter, Wage and Hour Manual, Section 95:551 (1982).

In the declaration of the purpose of the EPA, Congress found that the existence of wage differentials based on sex: (1) depresses

wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes thereby burdening, affecting and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition. Public Law 88-38; 77 Stat. 56, reprinted in 1963 U. S. Code Cong. & Ad. News 59, S. doc. no. 1409, 88th Cong., First Sess.

The EPA, 29 U.S.C. Section 206(d)(1), reprinted above at page 2 of this brief, provides in essence that an employer subject to the provisions of the Fair Labors Standard Act shall not discriminate on the basis of sex between employees who perform jobs which require equal skill, effort and responsibility and which jobs are performed under similar working conditions. The statute then goes on to provide exceptions to this rule where payment is made pursuant to (1) a seniority

system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; and ( differential based on any other factor other than sex.

Once the petitioner has shown a prima facie case of violation of the EPA, the burden of proof shifts to the respondent to show that any pay differentials are justified under one of the four exceptions:

> A prima facie case of a violation of the Equal Pay Act is analytically quite simple. As the district court noted, the plaintiff's initial burden is to prove that "an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which require equal skill, effort and responsibility, and which are performed under similar working conditions.'" Corning Glass Works v. Brennan, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974) (quoting 29 U.S.C. ss. 206(d)(1)). See EEOC v. Mercy Hospital and Medical Center, 709 F.2d 1195, 1197 (7th Cir. 1983) (applying Corning Glass prima facie case). While the work performed by the two employees (or groups of employees) need not be identical, it must be "substantially equal." EEOC v. Mercy Hospital and Medical Center, 709 F.2d at 1197. See also Corning Glass Works v. Brennan, 417 U.S. at 203 n. 24, 94 S.Ct. at 2232 n. 24. If the plaintiff succeeds in proving a prima

> facie case, the burden shifts to the defendant to show that any pay differential is justified under once of the Equal Pay Act's four exemptions.

Epstein v. Secretary of the United States Department of the Treasury, 739 F.2d 274, 277 (7th Cir. 1984) Also see Strecker v. Grand Forks County Social Services Board, 604 F.2d 96, 99 n. 1, 104-105 (8th Cir. 1980), where the following was upheld:

> Under the Equal Pay Act, once a prima facie case has been established, 29 U.S.C. s. 206(d) provides defendants four affirmative defenses. Defendants have the burden of proving the wage disparity is the result of . . .; [29 U.S.C. 206(d)(1)(i-iv)]. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Schultz v. American Can Company, 424 F.2d 356, 362 Note 10 (8th Cir. 1970).
>
> I think it is clear, however, that once a prima facie case of discrimination is established, the employer bears the burden. . .

Other cases confirm this rule regarding the burden of persuasion under the EPA. For representative cases see the following: Usery v. Allegheny County Instructional District, 544 F.2d 148 (3rd Cir. 1976), cert. denied 430

U.S. 946 (1977); Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983); Kenyatta v. Bookeley Packing Company, 649 F.2d 552 (8th Cir. 1981); Kouba v. All State Insurance, 691 F.2d 873 (9th Cir. 1982); Equal Employment Opportunity Commission v. Maricopa County College District, 736 F.2d 510 (10th Cir. 1984); Morgado v. Birmingham-Jefferson County Civil Defense, 706 F.2d 1184 (11th Cir. 1983) (en banc); and Higdon v. Evergreen International Airlines, Inc., 673 P.2d 907 (Ariz. 1983).

It has been made clear that this burden of proof remains with the defendant once a prima facie case has been proved by the plaintiff.

> In order to make out a prima facie case of sex discrimination in wages under the Equal Pay Act, a plaintiff's initial burden is to show that the defendant employer paid higher wages to male faculty members for equal work on jobs the performance of which required equal skill, effort and responsibility under similar working conditions. Corning Glass Works v. Brennan, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974). Once this prima facie case is

established, the burden of proof shifts to the defendant employer to show that the male was paid more than the female because of one of the exceptions listed under the Equal Pay Act, 29 U.S.C. ss. 206(d)(1)(i-iv). Id. at 196, 94 S.Ct. at 2229. The defendant employer's burden of establishing that one of the four exceptions in ss. 206(d)(1) applies is in the nature of an affirmative defense. . .

This legal standard is quite different from the legal standard employed in a claim brought solely on the basis of Title VII. As already explained under Title VII once the plaintiff has established a prima facie case the defendant need only articulate a legitimate, nondiscriminatory reason for the action claimed to be discriminatory. McDonnell Douglas, supra; Texas Department, supra, 450 U.S. at 254-255, 101 S.Ct. at 1094, 1095. Once this articulation is made in a Title VII action, the plaintiff must then establish that the articulated reason given by the defendant was a pretext for unlawful sex discrimination. Id. In a case brought exclusively under Title VII, the burden of proof never shifts to the defendant; under the Equal Pay Act, however, the burden of proof does shift to the defendant once the plaintiff meets the initial prima facie burden. Corning Glass Works, supra.

Melanson v. Rantoul, 536 F. Supp. 271, 286 (D. R. I. 1982).

The case most often cited as the primary authority for this rule is Corning Glass Works

v. Brennan, 417 U.S. 188 (1974). The Court held as follows in Corning Glass:

> The Act also establishes four exceptions--three specific and one a general catchall provision--where different payment to employees of opposite sexes "is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." Again, while the Act is silent on this question, its structure and history also suggest that once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions. All of the many lower courts that have considered this question have so held, and this view is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof.

Id. at 196-198. Although the Court did not specifically indicate what level of proof the plaintiff must meet to shift the burden, the cases cited by the Court at page 197 in note 11 indicate that the burden of persuasion shifts once the plaintiff has shown a prima

facie case. See for example Hodgson v. Corning Glass Works, 474 F.2d 226, 231 (2nd Cir. 1973); and Brennan v. Corning Glass Works, 480 F.2d 1254, 1258 (3rd Cir. 1973).

The facts of this case, as well as the numerous cases supporting the rule that the burden of persuasion is on the defendant, indicate there are strong reasons for the rule. First, the EPA is broadly remedial and it should be construed so as to fulfill the underlying purposes which Congress sought to achieve. Corning Glass Works v. Brennan, 417 U.S. 188, 209 (1974) and Hein v. Oregon College of Education, 718 F.2d 910, 913 (9th Cir. 1983).

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry--the fact that the wage structure of "many segments of American Industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S.Rep. No. 176, 88th Cong., 1st Sess., 1 (1963).

Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974). The EPA was intended as a broad charter of women's rights in the economic field. Brennan v. Board of Education, 374 F. Supp. 817 (D. N. J. 1974).

The rule concerning the shifting of the burden of proof is perhaps most strongly supported by cases holding that the facts necessary to establish that a wage differential has a basis in a factor other than sex are peculiarly within the knowledge of the employer. Morgado v. Birmingham-Jefferson County Civil Defense, 706 F.2d 1184, 1189 (11th Cir. 1983) (en banc). Also see Schultz v. Wheaton Glass Co., 421 F.2d 259, 267 (3rd Cir. 1970) where the court held:

> The burden of showing this properly fell on the company, for it invoked the defense that the differential was based on a factor other than sex. In cases such as this, where the justification for the differential rests on economic benefit, the company has peculiarly within its knowledge the means of proof, and the burden therefore is one which cannot be satisfied by general or conclusory assertions.

The cases in support of this rule and the reasons behind the rule are so strong it has been said that the EPA creates a type of strict liability, that no intent to discriminate need be shown, and that unless the employer has this burden, the prima facie case concept is so weakened as to be useless. Klimore v. Far-Mar Company, Inc., 549 F. Supp. 438 (W.D. Mo. 1982), reversed in part on other grounds 709 F.2d 499 (8th Cir. 1983). The decision of the Seventh Circuit in this matter obviously abandons this rule.

In this case the reasons for differential of salary between the traffic managers was never communicated to the petitioner and was never documented. The petitioner was therefore put in a position to disprove the subjective reasons for disparity in salary asserted by the respondent after the fact. This case, therefore, is an excellent example of why the burden should be on the employer.

The Seventh Circuit Court of Appeals has now changed this rule for the first time by providing a different definition. Its definition makes the use of the term prima facie meaningless. The decision of the Seventh Circuit in this matter changes the burden on the petitioner from that of a prima facie case to a burden by preponderance of the evidence.

There is no Title VII or EPA case, except this one, which use the term prima facie case in any way other than the traditional definition. See for example, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 at 255 (1981), where the court speaks of the prima facie case raising an inference of discrimination.

In Briggs v. City of Madison, 536 F. Supp. 435, 443, 444 (W. D. Wis. 1982), there appears an excellent discussion of the meaning of a prima facie case:

> Examination of plaintiff's assertion requires analysis of the purpose and

> function of a prima facie case in employment discrimination litigation. Essentially, the prima facie case is a means of ordering proof that reflects both a judicial evaluation of the probabilities of the situation and the expectation that the defendant-employer has superior access to the proof that will either rebut or support plaintiff's prima facie case. . .
>
> The critical question is whether a reasonable fact finder could infer from a showing of the first four elements, or from all five, that it is more probable than not that the defendant engaged in an employment practice made unlawful by Title VII.

Emphasis added.

The Seventh Circuit in this matter indicates that petitioner wishes to superimpose the tripartite template of shifting burdens that are familiar in the Title VII context. Opinion, page 3. This is not accurate. Petitioner made clear in its brief to the Seventh Circuit that the burdens in Equal Pay Act and Title VII are quite different. See Melanson v. Rantoul, 536 F. Supp. 271, 286 (D. R. I. 1982) as quoted supra in this petition at pages 18 and 19 and quoted

by petitioner at page 12 of her brief in the Seventh Circuit.

It was clear until now that the question of whether a prima facie case was met was a matter of law for the judge to decide. The question used to be (and apparently is in other circuits): "Is there enough evidence produced to enable a reasonable fact finder to infer that the petitioner has made her case?"

The Seventh Circuit now holds that a finding of prima facie does not matter and that the burden of proof remains on the employee.

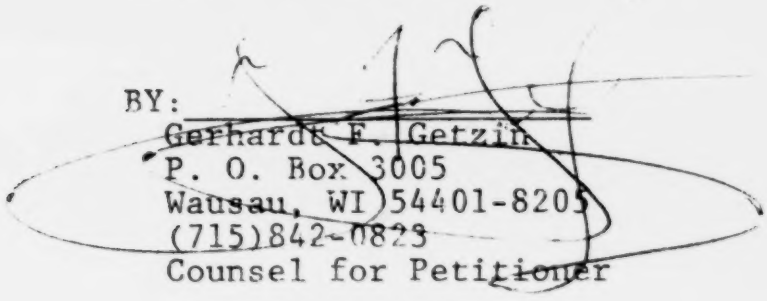
This Court should resolve the conflict of the Seventh Circuit's decision with those of other Circuits.

## CONCLUSION

For this reason, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

GETZIN & JANNETTA



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JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 19, 1985

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

| | |
|---|---|
| ELLEN V. PLISKA, | )Appeal from the |
| Plaintiff-Appellant, | )United States |
| | )District Court |
| No. 84-2820 vs. | )for the Western |
| STEEL KING INDUSTRIES, INC., | )District of |
| Defendant-Appellee. | )Wisconsin |
| | )No. 83 C 909 |
| | )Judge Barbara B. |
| | )Crabb |

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued April 19, 1985

August 19, 1985

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

| | |
|---|---|
| ELLEN V. PLISKA, | )Appealed from |
| Plaintiff-Appellant, | )the United States |
| | )District Court |
| No. 84-2820 vs. | )for the Western |
| | )District of |
| STEEL KING INDUSTRIES, INC., | )Wisconsin. |
| Defendant-Appellee. | )No. 83-C-909-C |
| | )Barbara B. Crabb, |
| | )Judge. |

## ORDER

Ellen v. Pliska appeals from a jury verdict against her Equal Pay Act claim. See 29 U.S.C. s. 206(d)(1) (1982) ("the Act"). The Act, in essence, requires employers to pay the sexes equal pay for equal work. The sole issue on appeal is whether the district court erred in instructing the jury that Pliska bore, the burden of persuasion on the issue of whether the work she performed was substantially equal to that of her male predecessor. We affirm.

I

Pliska succeeded Terry Wenzel, a male, as traffic manager for defendant Steel King Industries, Inc. ("Steel King"). Because Pliska's salary was significantly lower than Wenzel's, she filed an action pursuant to the Act. At trial Steel King introduced evidence tending to establish that Wenzel's duties were

more demanding than Pliska's, despite the shared job title. Wenzel was responsible for setting up a traffic department; Pliska merely inherited the department. Wenzel spent about half his time supervising operations in the manufacturing plant once the traffic department was organized; Pliska did not.

Contending that she had established a prima facie case of unequal pay under the Act, Pliska requested a jury instruction that placed the burden of persuasion on Steel King to show that the work was not equal. Instead, the district judge instructed the jury that Pliska had to establish by a preponderance of the evidence that she performed job duties substantially equal in terms of skill, effort, and responsibility with those performed by Wenzel.

II

A prima facie case under the Act is established if the plaintiff proves that an

employer pays unequal wages to employees of opposite sexes for work that is substantially equal in terms of skill, effort, and responsibility. Epstein v. Secretary, United States Department of Treasury, 739 F.2d 274, 277 (7th Cir. 1984); accord Corning Glass Works v. Brennan, 417 U.S. 188, 195-96 (1974); cf. EEOC v. Mercy Hospital & Medical Center, 709 F.2d 1195, 1197 (7th Cir. 1983) (work need only be "substantially equal"). If the plaintiff proves a prima facie case, the burden shifts to the defendant to prove that any pay differential is justified by one of the Act's four limited exemptions. Epstein, 739 F.2d at 277; accord Corning Glass, 417 U.S. at 195-96. The four exemptions are:

> [E]xcept where such [discriminatory] payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . .

29 U.S.C. s. 206(d)(1).

Pliska urges that a showing of

substantially equal work fits into the catchall fourth exemption. This is not a tenable reading of the statute because the clause preceding the four exemptions defines substantially equal work as an element of the offense:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibilty, and which are performed under similar working conditions, except . . . .

29 U.S.C. s. 206(d)(1). In any event, this court has already defined a showing of substantially equal work as an element of the prima facie case. E.g., Epstein, 739 F.2d at 277.

At oral argument Pliska contended that she established a prima facie case merely by raising a "reasonable inference" of unequal pay for substantially equal work. In effect

Pliska would have us superimpose the tripartite template of shifting threshold burdens of proof that are familiar in the Title VII context. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). We are aware of no court that has applied the Burdine template in the Equal Pay Act context. We decline to overrule the definition of prima facie case set forth in Epstein, 739 F.2d at 277, which in turn follows the Supreme Court's own treatment of the issue in Corning Glass, 417 U.S. at 195-96.

Finally, Pliska contends that the district judge in fact found a prima facie case, and therefore the burden of persuasion should have shifted to Steel King. Viewed in context, the district judge's statement that Pliska had established a "prima facie case" was meant only to convey her finding that Pliska had introduced sufficient evidence to survive a motion for a directed verdict.

The judgment is affirmed.

Supreme Court, U.S.
FILED
JAN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

---

ELLEN V. PLISKA, Petitioner,

v.

STEEL KING INDUSTRIES, INC., Respondent

---

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

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Stevens Point, WI 54481

Counsel for Respondent

December 26, 1985

BEST AVAILABLE COPY

## QUESTION PRESENTED

Was it error to instruct the jury that the petitioner, Ellen Pliska, had the burden to prove by a preponderance of the credible evidence that she was paid a wage less than a wage paid to a male employee for equal work performed which required similar skills, efforts and responsibility substantially equal to those required of a male and that the job was performed under similar working conditions?

Answered by Court of Appeals: No

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The respondent Steel King Industries, Inc. submits the following brief in opposition to petitioner's Writ of Certiorari.

## SUPPLEMENTAL STATEMENT OF THE CASE

1. Respondent's Evidence Rebutted Petitioner's Testimony That Her Work Was Equal to That of Male Employee.

At the trial in the District Court, petitioner contended that she was paid a lesser wage than a male employee Terry Wenzel for an equal job the performance of which required equal skill, effort and responsibility and which was performed under similar working conditions. Respondent submitted evidence to the contrary. Terry Wenzel was an experienced traffic manager who had been hired to set up a traffic department for respondent. Record 78 p. 93-95. After setting up the traffic department he continued to work for respondent but less than 50% of his time was spent in the traffic department, the remaining time being spent as plant manager in the production department. Record 78 p.

67, 68 and 96. During the latter part of his employment the company sales decreased and eventually the company filed under the Bankruptcy Act.

Ellen Pliska, the petitioner, who had no previous experience in the traffic department was named as the replacement for Terry Wenzel but only with respect to duties in the traffic department and none in the plant. Record 78 p. 64. She had nothing to do with setting up the department, she had no duties in the plant and while she was working as Terry Wenzel's replacement in the traffic department the company's sales had decreased by 50% and it had filed for protection under Chapter 11 of the Bankruptcy Act.

The trial court instructed the jury as follows:

"For you to find that Steel King Industries did not pay plaintiff, Ellen Pliska, compensation equal to that of male employees, you must find that plaintiff has proven the following by a preponderance of the credible evidence. First of all, that the plaintiff performed work equal to Terry Wenzel, in that the job she performed requires skills, effort and responsibility substantially similar -- excuse me -- substantially equal to those required of Terry Wenzel and that the job was performed under working conditions similar to those of Terry Wenzel; and, two, that plaintiff was paid a wage less than the wage paid to Terry Wenzel." Record 76, p. 123, 124.

2. Court's Statement on "Prima Facie Case" Referred Only to Respondent's Motion for Directed Verdict.

At the close of petitioner's case respondent moved the court for a directed verdict dismissing the petitioner's case. The court stated "At this time I'm not prepared to grant the defendant's motion for directed verdict. I think that the plaintiff has met the burden of putting on a

prima facie case." Record 76 p. 23. The court then directed the respondent to put on its case, which it did. Petitioner, in its statement of the case has erroneously stated that "...the court found that the petitioner had met the burden of putting on a prima facie case." On page 9 and 10 of her brief. Petitioner has taken the trial court's comments out of context and her statement is contrary to the decision of the Court of Appeals which held, "Viewed in context, the District Judge's statement that Pliska had established a 'prima facie case' was meant only to convey her finding that Pliska had introduced sufficient evidence to survive a motion for directed verdict."

## SUMMARY OF ARGUMENT

Petitioner has completely misinterpreted the question of "burden of proof". It would seem that she would have the court rule that once a female has been paid a

different wage than a male employee that she has met the burden of proving a "prima facie" case. She fails to take into consideration the remainder of the applicable law that requires a further showing that the inequal pay must be for equal work. The Court of Appeals decided Corning Glass Works v. Brennan, 94 S.Ct. 2223 (1974). In the Corning case the United States Supreme Court stated:

> "...once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." (emphasis ours) p. 2229

The Corning rule was followed in Epstein v. Secretary, United States Department of Treasury, 739 F.2d 274, 277 (7th Cir. 1984). In Epstein the court held:

> "A prima facie case of a violation of the Equal Pay Act is analytically quite simple.[5] As

> the district court noted, the plaintiff's initial burden is to prove that 'an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which require equal skill, effort and responsibility, and which are performed under similar working conditions'' ..." p. 277 (footnote omitted)

Respondent submitted substantial testimony refuting petitioner's contention that the work she performed was equal and required equal skill, equal effort and equal responsibility as that of the male employee, Terry Wenzel. As a result an issue of fact existed and it was up to the jury to determine whether or not petitioner had met her burden. The District Court properly instructed the jury and the jury found that she had not met that burden.

As pointed out in the Supplemental Statement of Fact, petitioner has erroneously stated that the court found that the petitioner had meet the burden of

putting on a prima facie case. As the Court of Appeals ruled, the trial court did not find that the petitioner had established a prima facie case. Taken in context, the trial court's statement "was meant only to convey her finding that Pliska had introduced sufficient evidence to survive a motion for a directed verdict." The trial court's finding is substantiated by the commonly used and accepted definition of the terms. In Black's Law Dictionary (5th Edition 1979) at page 1071 it is stated:

> "A prima facie case consists of sufficient evidence in the type of case to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a non-jury case; it is the evidence necessary to require defendant to proceed with his case. White v. Abrams, C.A. Cal., 495 Fed. 2d 724, 729. Courts use concept of 'prima facie' case in two senses: (1) in sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favor of allegation

> he asserts; this means plaintiff's evidence is sufficient to allow his case to go to jury, and (2) courts use 'prima facie' to mean not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it. Husbands v. Com. of Penn., D.C. Penn. 395 Fed. Supp. 1107, 1139."

## CONCLUSION

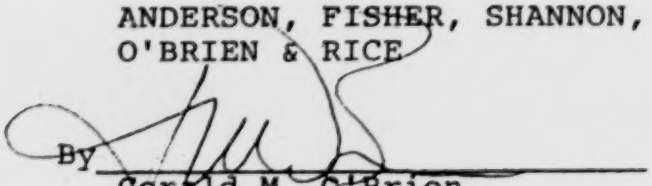
The trial court properly instructed the jury with respect to petitioner's burden of proof in this case. The Court of Appeals upheld this instruction citing its own case law which relied upon the language of the The United States Supreme Court. There is no error, there is no inconsistency and

petitioner's request for a Writ of Certiorari should be denied.

Dated December 26, 1985.

Respectfully submitted,

ANDERSON, FISHER, SHANNON,
O'BRIEN & RICE



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*Steel King Industries, Inc. has no parent companies, subsidiaries or affiliates.